

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
GEORGE W. SIMPSON, )  
 )  
Appellant, )  
 )  
v. )  
 )  
STATE OF WASHINGTON )  
DEPARTMENT OF ECOLOGY, )  
 )  
Respondent. )

PCHB No. 846

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND ORDER

This matter, the appeal of the denial of a ground water permit, came on for formal hearing before Ellen D. Peterson, hearing officer for the Pollution Control Hearings Board, on October 20, 1975, in Yakima, Washington. Appellant was represented by Gordon Blechschmidt; Assistant Attorney General Joseph J. McGoran appeared for the respondent Department of Ecology.

Witnesses were sworn and testified; exhibits were introduced and admitted.

The Board having read the transcript, having examined the exhibits,

1 and having reviewed the proposed Findings of Fact, Conclusions of Law  
2 and Order of the presiding officer, and having considered respondent's  
3 Exceptions and appellant's Reply thereto and, having denied the  
4 Exceptions, makes these

5 FINDINGS OF FACT

6 I.

7 On March 25, 1974, appellant filed an application for a ground  
8 water permit with the respondent Department of Ecology (DOE).  
9 Appellant sought to appropriate water in the amount of 400 gallons  
10 per minute, 173 acre-feet per year, between March 1 and October 1 for  
11 the irrigation of seventy acres of land. The point of diversion was  
12 to be on appellant's property 300 feet south and 300 feet west of  
13 the northeast corner of Section 9, Township 8 North, Range 23 E.W.M. in  
14 Yakima County. Water would be diverted from an infiltration trench  
15 constructed six feet beneath ground level and composed of 2500  
16 lineal feet of six, eight, and ten-inch tile. Such trench has been  
17 in place since 1969.

18 II.

19 On March 26, 1975, following a field investigation on December 30,  
20 1974, the Examiner concluded in his report that: "Waters for which  
21 applicant has applied are within the boundaries of the Sunnyside  
22 Valley Irrigation District and exist as a result of return flow of  
23 district waters and as such are not public waters within the meaning of  
24 chapter 90.03 RCW. Therefore, the waters in question are not subject to  
25 appropriation . . . ." The DOE, on April 1, 1975, accepted the  
26 Examiner's recommendations and issued its Findings of Fact and

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 Order denying the permit. Appellant timely filed his appeal to this  
2 Board on April 30, 1975.

3 III.

4 The Sunnyside Valley Irrigation District (hereinafter SVID)  
5 is one of a number of entities which are supplied with water by  
6 the Bureau of Reclamation as part of its Yakima Project. Specifically,  
7 the SVID is within the Sunnyside Division of the project, waters for  
8 which are diverted from the Sunnyside Dam. Waters supplied to the  
9 Sunnyside Division by the Bureau of Reclamation result from a  
10 combination of natural flow rights (706 cubic feet per second) and  
11 contractual rights (610 cubic feet per second) as detailed in a  
12 1945 Consent Decree.

3 IV.

14 Return flow is the general movement of all waters, both surface  
15 and subsurface channelized or diffused by gravity to a point of  
16 lower elevation. While the contract between the Bureau and the  
17 SVID (Exhibit R-2) does not speak specifically to return flow, it was  
18 the testimony of the project's superintendent that the Bureau  
19 regarded the return flow of waters supplied for irrigation on a  
20 contractual basis as belonging to the SVID while within the District's  
21 boundaries. It should be noted that the water right claim for the  
22 Sunnyside Division registered with the DOE by the Bureau on June 4,  
23 1974, is limited to "surface water" whose source is the "Yakima  
24 River" (Exhibit R-3).

25 V.

6 Appellant's lands, and in particular the point of diversion  
27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER 3

1 requested in the application, undisputedly lie within the boundaries of  
2 the SVID.

3 Appellant, a native of the area, purchased the subject property  
4 in 1958 and since then has farmed it with his son. An indefinite but  
5 substantial amount of subsurface water has been collecting under this  
6 land for a number of years. In 1969 appellant constructed the  
7 infiltration trench, noted in the application, to drain the soggy soil.  
8 A three horsepower pump was installed to pump the excess drainage  
9 from appellant's trench into the Yakima County Drainage District line  
10 which, at a higher elevation, runs parallel to the trench. After the  
11 water is lifted into the Drainage District line, it discharges into an  
12 open drain. The open drain, from which several appropriators divert waters  
13 under contract with the SVID, meanders easterly through the Byron Ponds  
14 and empties into the Yakima River. The elevation of appellant's property  
15 at the proposed point of diversion is 695 feet. The Yakima River, two  
16 miles to the east, is at an elevation of 638 feet.

17 VI.

18 While the record is unfortunately murky as to the topography of  
19 the relative land areas, it does appear that no bodies of water exist  
20 in the vicinity at elevations higher than appellant's property; however,  
21 lands irrigated by the SVID do slope downward toward appellant's  
22 land.

23 VII.

24 At no time since the inception of the Yakima Project in the  
25 early 1900's has the SVID made any effort to recapture seepage waters  
26 from its irrigation either prior to the water's entry onto appellant's

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 | property or once such waters had bogged his soil. Under questioning, the  
2 | Watermaster of the SVID admitted that if the permit is denied, the  
3 | water, or "most of it," would remain at the bottom of appellant's land.

4 | VIII.

5 | Any Conclusion of Law hereinafter recited which should be deemed  
6 | a Finding of Fact is hereby adopted as such.

7 | From these Findings, the Pollution Control Hearings Board  
8 | comes to these

9 | CONCLUSIONS OF LAW

10 | I.

11 | Under RCW 90.44.035, waters made available incidental to irrigation  
12 | which otherwise would have been dissipated by natural waste are  
13 | designated as "artificially stored ground water." RCW 90.44.040  
14 | "Public ground waters subject to appropriation" provides:

15 | "Subject to existing rights, . . . all artificial  
16 | ground waters that have been abandoned or  
17 | forfeited, are hereby declared to be public ground  
18 | waters and to belong to the public and to be  
19 | subject to appropriation for beneficial use . . . ."

18 | II.

19 | The waters which have collected on appellant's land are seepage  
20 | from irrigation projects of the SVID and as such are artificial ground  
21 | waters within the meaning of RCW 90.44.035.

22 | III.

23 | The Board recognizes that the SVID does have a right to recapture  
24 | its seepage or return flow within its boundaries when such recapture

25 |

26 |

27 | FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

1 is applied to a beneficial use consistent with the initial irrigation.<sup>1</sup>  
2 Thus, those waters percolating through appellant's land by natural means  
3 which reach the Yakima County Drainage District ditch and thereafter the  
4 open drain are waters properly applied to lower appropriators under  
5 contract with the SVID and are not appropriable by the appellant.

6 IV.

7 Under the facts of this case, the right to recapture was not  
8 exercised as to those waters permitted for years to collect on  
9 appellant's land; no beneficial use was ever made of them by the  
10 District.<sup>2</sup>

11 Statutory forfeiture pursuant to RCW 90.14.130 is not applicable  
12 in this matter. Nor has the SVID ever articulated its intention to  
13 abandon these waters. However, the District's protest of appellant's  
14 application at this time cannot outweigh the significance of its  
15 historic failure to exercise its right of recapture as to the collected  
16 waters and an intent to abandon same will be implied.<sup>3</sup> Indeed, as

---

18 1. See Ide v. United States, 263 U.S. 497 (1924);  
19 Miller v. Wheeler, 54 Wash. 429, 103 Pac. 641 (1909).

20 2. See generally, "Once Released Irrigation Waters:  
21 Liability and Litigation," 36 Mont. L. Rev. 14 (1975).

22 3. "Abandonment of a water right is not to be confused with  
23 problems related to release or recapture of specific  
24 quantities of water or of return flow (emphasis added)."  
25 Waters and Water Rights, Vol. 5, § 429.2 at 338 (1972).

26 " . . . not an abandonment of water right but an abandonment  
27 of specific portions of water viz. the very particles that  
are discharged or have escaped from control." Vaughan v. Kolb,  
130 Ore. 506, 280 Pac. 518, 520 (1929).

See also Wiel, Water Rights in the Western States, § 233  
pp. 356-357 (2d Ed. 1908).

1 witness the Watermaster's own testimony, in future these waters would  
2 continue to be physically, and we hold legally, abandoned.

3 The Board concludes therefore that such quantities of water  
4 having been abandoned by the SVID are thus appropriable under RCW 90.44.040.

5 V.

6 Respondents have contended that considering the source of the  
7 waters, insufficient certainty exists as to their continued flow and thus  
8 the waters should not be deemed appropriable. It would seem that  
9 such logic would apply to all lower appropriators of the District  
10 who depend on recaptured return flow as their source.

11 In concluding that waters now retained on appellant's land are  
12 appropriable, the Board does not impose upon the SVID any obligation to  
13 continue its irrigation in a manner assuring seepage of its waste onto  
14 appellant's land.<sup>4</sup> Nonetheless, the topography of the lands involved and  
15 the indicated future action of the District as to the collected waters  
16 guarantees sufficient certainty to justify an appropriation at this time  
17 if all other criteria can be met.<sup>5</sup>

18 VI.

19 Underlying the Board's analysis and conclusions in this matter  
20

---

21 4. See, e.g., Oliver v. Skinner, 190 Ore. 423, 226 P.2d 507  
22 (1951), Bower v. Big Horn Canal Ass'n., 77 Wyo. 80, 307  
23 P.2d 593 (1957).

24 5. Note that RCW 90.03.290 "Appropriations procedure . . ."  
25 directs the supervisor to find not only that "there is  
26 water available for appropriation for a beneficial use"  
27 but also that "the appropriation thereof as proposed in  
the application will not impair existing rights or be  
detrimental to the public welfare . . .".

1 is the basic tenet of western water rights law which has seemingly  
2 been ignored by respondent, i.e., the conservation and beneficial use  
3 of a precious resource. Indeed, without exception, all cases cited  
4 by respondent stress that the most beneficial use of the water and the  
5 prevention of wastage must be critical in the court's decision.  
6 Further, in the instant matter, the terms of the contract between the  
7 Bureau and the SVID limit the amounts of water to be supplied to the SVID  
8 to that "which can be used beneficially." (R-2, p. 13). The bogging  
9 of appellant's land is not a beneficial purpose.

10 VII.

11 Any Finding of Fact which should be deemed a Conclusion of Law  
12 is hereby adopted as such.

13 Therefore, the Pollution Control Hearings Board issues this

14 ORDER

15 The denial of appellant's ground water application is vacated;  
16 the matter is remanded to the DOE for further processing of the  
17 application consistent with these Findings of Fact and Conclusions  
18 of Law.

19 DONE at Lacey, Washington, this 6<sup>th</sup> day of April, 1976.

20 POLLUTION CONTROL HEARINGS BOARD

21 W. A. Gissberg  
22 W. A. GISSBERG, Member

23 Walt Woodward  
24 WALT WOODWARD, Member

25 Did not participate  
26 CHRIS SMITH, Chairman

27 FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER